United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2623

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MARK BAYER, a minor by his parent and natural guardian, STEPHEN BAYER, and SUSAN MOONITZ, a minor by her parent and natural guardian, LILLIAN MOONITZ,

Plaintiffs-Appellees,

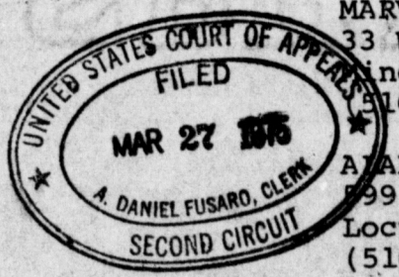
-against-

WILLIAM A. KINZLER, individually and in his capacity as Superintendent of Schools, Union Free School District No. 22; JOHN A. McLENNAN, individually and in his capacity as Principal of Farmingdale High School; BOARD OF EDUCATION, UNION FREE SCHOOL DISTRICT NO. 22,

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEES' BRIEF



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STATEMENT

The Plaintiffs-Appellees adopt the statement set forth in Defendants-Appellants' brief.

ARGUMENT

POINT I

THE LOWER COURT DID NOT ERR IN FINDING THAT PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT RIGHTS WEREINFRINGED BY DEFENDANTS' SEIZURE AND PROHIBITION OF DISTRIBUTION OF THE NEWSPAPER AND SUPPLEMENT

Students within the school environment retain their First Amendment rights, Tinker v Des Moines Community School Dis., 393 U.S. 503 (1969). Any legal prohibition of the exercise of First Amendment rights within the school would have to be based upon a finding and showing that the exercise of those rights would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, Tinker, supra, 509.

In the case at bar, we are dealing with the right to distribute the official school newspaper within the school when that newspaper contains information concerning contraception, pregnancy and abortion. The appellant has taken the position that it does not object to the distribution of opinion concerning the above subjects, but does object to

the distribution of any material which is factual.

In the Tinker case, the court referred to the school officials banning of an expression of opinion. However, there is, in many cases, no clear distinction between fact and opinion. One man's fact may be another man's blasphemy. However, the entire reading of Tinker reveals that the issue is not opinion versus fact but rather that "freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." Tinker, supra 513.

It is relevant to note that the school officials have not banned expression of opinion concerning abortion and contraception but only material referring to methods of abortion and contraception which could be found in any encyclopedia. This distinction cannot meet the constitutional objection to restrictions on First Amendment rights. It is further relevant to note that when the newspapers and supplements were distributed, there was no disruption of the educational process.

The appellant apparently believes that since the School District does not permit sex education as part of the curriculum, the distribution of the sex information supplement is an impermissible intrusion upon the work of the

school. However, as this Court noted in Eisner v Stamford Board of Education, 440 F. 2d 803 (1971) and is clear from a reading of Tinker, an intrusion upon the work of the school is disruptive speech which would invite immediate breach of the peace or fighting words. Any intrusion which does not disrupt normal classroom work but merely results in additional information, in this case outside the classroom, is not that type of intrusion which the School District could ban without doing violence to First Amendment rights.

A similar curriculum control argument was raised in Zucker v Panitz 299 F. Supp. 102 (1969). The Court disposed of the issue holding "It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas. The rationale of Tinker carries beyond the facts in that case."

POINT II

PLAINTIFFS-APPELLEES AGREE THAT DISTRIBUTION OF THE SUBJECT NEWSPAPER DOES NOT RENDER THE ISSUE MOOT.

As appellants have submitted, the issues raised in the instant case will most probably come to light again in the near future. The cases cited by appellants admittedly support their contention that the case is not rendered moot on appeal because distribution has been accomplished. Appellees agree with this position.

POINT III

IN THE ABSENCE OF ANY MATERIAL ISSUE OF FACT THE LOWER COURT WAS CORRECT IN CONSOLIDATING THE TRIAL UPON THE MERITS WITH THE HEARING FOR A PRELIMINARY INJUNCTION.

Appellants contend that the absence of notice to consolidate has deprived them of their right to present their case on the merits. They have failed, however, to specifically allege how they have been prejudiced. There is no claim that the appellants had any additional evidence or legal argument to present which was not offered upon the hearing. More importantly, appellants have failed to allege that any issue of fact whatsoever existed which would have rendered any further hearing or trial necessary or fruitful.

The respective parties have been in complete accord as to the facts throughout the proceedings in the lower court. The appellants' opposing papers below and the statement of facts made a part of their brief on appeal contain a rendition of the facts identical to that submitted by the appellees and incorporated by the Court in its decision. No issue of fact was raised by either party upon the hearing.

Appellants have placed reliance on a number of cases in support of their contention that the absence of notice mandates reversal. In Capital City Gas Co. v Phillips Petroleum Co., 373 F. 2d 128 (2d Cir. 1967) this Court remanded a case wherein the lower court had consolidated the hearings for preliminary and permanent relief without notice to the parties. It is important to note, however, that the Court stressed the existence of material issues of fact which were left unresolved by the lower court. The defendants therein had denied material allegations of fact in their answering papers and had set up three affirmative defenses. Id, at 131. In Puerto Rican Farm Workers v Eatmon, 427 F. 2d 210 (5th Cir. 1970), the appellant had sought to introduce new evidence upon hearing that judgment was final. The refusal of the trial court to grant this request was deemed prejudicial by the Circuit Court and the case was remanded. This element of additional evidence is clearly absent in the instant case. Additionally, it should be noted

STATE OF NEW YORK)

COUNTY OF NASSAU)

SHELLEY FELDER being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at Mineola, New York.

On March 25, 1975, deponent served the within Appellees' Brief upon Kendrick C. Smith, attorney for Appellants in this action, at 341 Conklin Street, Farmingdale, New York, the address designated by said attorney for that purpose by depositing 3 true copies of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Shelley Felder

SHELLEY FELDER

Sworn to before me this
25th day of March, 1975.

Marvin Zevin

MARVIN ZEVIN
NOTARY PUBLIC, State of New York
No. 30-9798395
Qualified in Nassau County
Commission Expires March 30, 1976

that appellants made no attempt to correct the alleged error while still in the Court below by motion (Rule 59(e), Federal Rules of Civil Procedure).

The decisions rendered in Pughsley v 3750 Lake Shore Drive Co-op Bldg., 463 F. 2d 1055 (7th Cir. 1972); and Nationwide Amusement, Inc. v Nattin, 452 F 2d 651 (5th Cir. 1971), do not make clear whether issues of fact were present in the lower court which were left unresolved.

No questions of fact were present in the instant case and all issues of law have been resolved by the District Court. Nothing remains to be tried. In Standard Oil Company of Texas v Lopeno Gas Company, 240 F. 2d 504 (5th Cir. 1957) the Court stated that,

> "under such circumstances a reversal would be a useless formality." Id, 510.

A reversal on this ground in the instant case would likewise be fruitless.

CONCLUSION

FOR THE FOREGOING REASONS THE JUDGMENT ENTERED IN THE DISTRICT COURT IN FAVOR OF PLAINTIFFS-APPELLEES SHOULD BE AFFIRMED IN ALL RESPECTS.

Respectfully submitted,

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